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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

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To: The Commission

COMMENTS OF BELLSOUTH CORPORATION

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SUMMARY

In general. The Telecommunications Act of 1996 was enacted to eliminate artificial barriers that prevent local exchange carriers, interexchange carriers, and other telecommunications companies from competing in each others' markets. Congress sought to encourage all of these companies to provide a wide variety of services to consumers, generally described as "one-stop shopping." In particular, when Congress provided for entry by interexchange carriers into local exchange service and BOC local exchange carriers into interexchange service it sought to promote "parity" among these companies in their ability to provide the consumers with "one-stop shopping." The provisions of Section 271 and 272 were carefully balanced to achieve this objective.

The Commission is not free to revisit and supplement by regulation the comprehensive scheme established by Congress in these sections. Congress did not grant the FCC authority to adopt "legislative" rules, other than accounting rules, to flesh out these sections. Rules adding to the statutory requirements would be inconsistent with the balance struck by Congress. There is no need for adoption of non-accounting rules that do anything other than incorporate the statutory language. The Commission's *Interconnection Order* has already impermissibly tipped the competitive balance toward the interexchange carriers. BellSouth urges the Commission not to tilt the playing field any further here.

Joint Marketing. In particular, the decision by Congress to permit BOCs to engage in joint marketing of their local exchange service and their affiliate's interLATA service in-region must not be disturbed. Joint marketing is central to the effectuation of the 1996 Act's objectives and to BellSouth's business plans. Congress expressly decided that BOCs may provide "one-stop shopping" through joint marketing even though they must initially use a separate affiliate for engaging in interLATA service. The Commission's proposal to allow joint marketing only through an unaffiliated outside contractor directly contravenes the statute. This proposal would also violate the First Amendment, because it would be a direct prior restraint on commercial speech that is not needed to achieve any substantial governmental interest.

Scope of Commission Authority. Sections 271 and 272 do not give the FCC plenary authority over intrastate interLATA services. Section 2(b) generally deprives the Commission of such authority. Thus, while the explicit grants of FCC jurisdiction in Section 271 and 272 over intrastate interLATA services clearly override the generic restrictions in Section 2(b), these exemptions must be narrowly construed. Nothing in Sections 271 or 272 gives the FCC authority to adopt regulations inconsistent with Section 2(b). Moreover, the FCC does not have authority to adopt regulations that would preempt state regulations. State regulations inconsistent with the statute are preempted by the statute, and the states retain authority, under Section 2(b) to adopt regulations concerning intrastate interLATA services that do not impinge on Sections 271 and 272.

Activities Previously Authorized by the MFJ Court. The statute's separate affiliate requirements do not apply to any BOC activities that were previously authorized by the MFJ court. The provision of Section 272(h) that BOCs have one year to comply with the separate affiliate requirement does not affect such activities, which are permanently grandfathered under the terms and conditions established by the MFJ court.

InterLATA Information Services. First, information services are content-related and are, accordingly, subject to First Amendment protection. The Commission must, accordingly, construe the provisions of the 1996 Act narrowly with respect to information services and impose no greater restrictions on such services than are justified by a substantial governmental interest. Second, the BOCs may provide interLATA information services without the use of a separate affiliate outside their regions. Information services provided on an interLATA basis are "interLATA services" that the statute permits without a separate affiliate out-of-region. Third, some interLATA information services may be provided without a separate affiliate even in-region, because they are among the "incidental interLATA services" that are exempt from the separate affiliate requirement. These include audio, video, and other programming services (when they constitute an information service because they are provided via telecommunications), interactive programming services, alarm monitoring services, and other incidental services. Moreover, information services such as the telemessaging services offered in BellSouth's local exchange areas are intraLATA services that are not subject to the separate affiliate requirement. Such services that are not provided via interLATA telecommunications do not become interLATA information services merely because they may potentially be accessed via an interLATA carrier's facilities. Finally, the approach set forth by BellSouth to interLATA information services conforms better to existing FCC policies concerning BOC provision of enhanced services (a subset of information services) than subjecting all such activities to a separate affiliate requirement. The Commission should not discard a decade's experience indicating that nonstructural safeguards are more beneficial than structural separation. Congress did not intend to supplant the entire existing system of nonstructural safeguards.

Structural Separation Requirements. The structural separation requirements set forth in Section 272 are complete unto themselves. Congress did not authorize the Commission to supplement or alter the statutory scheme, except with respect to the prescription of accounting rules. Accordingly, the Commission lacks authority to promulgate substantive "legislative" rules to implement Section 272. In this connection, the requirement that a BOC's separate affiliate "operate independently" does not require implementing rules. In particular, this provision does not give the Commission the authority to impose additional separation requirements drawn from the *Computer II* rules. Moreover, the fact that in Section 274 Congress also imposed an "operate independently" requirement on electronic publishing but found it necessary to impose specific restrictions on certain activities indicates that those activities are not barred by the "operate independently" provision. Accordingly, the Section 272 affiliate is permitted to own property commonly with the BOC, use the BOC's name, trademarks, and service marks, and use the BOC to perform hiring, training, purchasing, installation, and maintenance, as well as research and development. Finally, the provision of Section 272 that requires the separate affiliate to have "separate officers, directors, and employees" does not authorize the Commission to prohibit sharing of in-house overhead and administrative services. The statute simply means that the affiliate may not have employees who are also BOC employees. Because the statute is silent about sharing of such services, sharing is permitted.

Nondiscrimination Safeguards. First, the Commission correctly concludes that the use of the term "discriminate" in Section 272(c)(1) includes only unjust or unreasonable discrimination. Accordingly, the statute forbids only discrimination between similarly situated companies, consistent with long-standing case law. Moreover, this section's prohibition of discrimination expressly does not apply to joint marketing activities. Thus, a BOC may, as part of its joint marketing of its affiliate's interLATA service, perform a variety functions that it will not be required to replicate for others. Second, BOC separate affiliates that provide interLATA service and also sell or market local exchange service under the joint marketing provisions of the statute do not thereby become "incumbent LECs" subject to the requirements of Section 272(c).

Enforcement Provisions. The Commission may conduct enforcement proceedings either in response to a complaint or on its own motion. If it proceeds on its own motion, Section 403 requires the Commission to afford the defendant BOC the same procedural protections that would apply in a complaint case, including notice of the *prima facie* evidence of noncompliance and a reasonable opportunity to rebut such evidence. After a *prima facie* case has been made, the burden of proof cannot be shifted to the BOC. The APA and governing case law makes clear that the proponent of an order revoking a BOC's authority to engage in interLATA service has the burden of proof. Absent a statutory exception, which the 1996 Act does not provide, the Commission cannot shift the burden of proof to the BOC, except to the extent the BOC raises an affirmative defense, similar to the defense of justification in a Section 202(a) discrimination case. The 1996 Act does not require a BOC to prove a negative every time the Commission entertains a complaint, and the Commission cannot so require. Similarly, the Commission cannot refuse to give a presumption of lawfulness to a BOC's compliance with the interLATA entry criteria after it has affirmatively held the BOC to be in compliance.

Classification of BOCs as Non-Dominant. The BOCs should be classified as non-dominant interLATA carriers, because they lack market power in the relevant product and geographic market concerning the provision of in-region, interstate, domestic and international services. As BellSouth demonstrated in the *Interstate Interexchange* rulemaking, the Commission should retain the relevant domestic product and geographic market definitions adopted in the *Competitive Carrier* proceeding. The Commission concluded therein that the relevant product market is "all interstate, domestic, interexchange telecommunications services," with no relevant submarkets, and the relevant geographic market is a single nationwide geographic market, with no relevant submarkets. The Commission properly concludes that there is a single relevant product market, but its proposal to utilize a BOC's in-region area as the relevant geographic market is flawed. Starting with zero market share, a BOC has no ability to raise interexchange service prices in its region; rather, any BOC entry is likely to increase competition and lower prices. The assumption that BOCs are dominant in providing local exchange access, an input into interexchange service, does not warrant the conclusion that a BOC will have market power over interexchange service in the region where it provides local exchange access. The Commission has in place a variety of nonstructural safeguards, including price caps, access charges, and accounting rules that will eliminate any ability or incentive to leverage the market arising from BOC control of access facilities, and the non-accounting and nondiscrimination safeguards of Section 272 are further barriers to BOC employment of exchange access to obtain market power over interexchange service in-region.

Moreover, the big three IXCs control about 85% of the interexchange market and have repeatedly increased prices in lock-step, suggesting that they may have engaged in tacit price coordination. As the Commission has previously recognized, BOC entry is the best solution to tacit price coordination by the existing market leaders. The Commission employed a single nationwide geographic market in finding AT&T non-dominant, stating that there was "no basis" for applying a different standard to AT&T "than that used for classifying its competitors." That same standard should, accordingly, be employed in determining whether the BOCs are non-dominant.

The same standards should also apply to the BOCs' provision of in-region international services. There are no significant distinctions between a BOC's ability to exercise market power over international and domestic interstate interLATA services.

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In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)))))))))))	CC Docket No. 96-149

To: The Commission

COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation ("BellSouth"), by its attorneys, hereby submits these comments in response to the Commission's *Notice of Proposed Rule Making*, CC Docket No. 96-149, FCC 96-308 (released July 18, 1996) (*NPRM*), *summarized*, 61 Fed. Reg. 39,397 (July 29, 1996).[1] In the *NPRM*, the Commission has requested comment on proposed regulations to implement and/or clarify the non-accounting separate affiliate and nondiscrimination safeguards prescribed by Congress in Section 272 of the Communications Act, as added by the Telecommunications Act of 1996 (the "1996 Act"),[2] for Bell Operating Company ("BOC") provision of in-region interLATA services. The Commission has also requested comment on whether to relax the dominant carrier classification applicable to the BOC provision of in-region, interstate, domestic interLATA services.

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1 References herein are to the paragraph and footnote numbers in the FCC-released version of the *NPRM*, which differ from those in the version published in the Federal Register.

2 Pub. L. No. 104-104, 110 Stat. 56 (1996).

INTRODUCTION

Some of the options under consideration in the *NPRM* would overstep, and in some cases frustrate, the carefully balanced and delineated non-accounting provisions that Congress established in the 1996 Act for the entry of the Bell Operating Companies ("BOCs") into the provision of interLATA service. In particular, the FCC proposes to adopt structural safeguards and restrictions for joint marketing of interLATA service that go beyond what Sections 271 and 272 require, upsetting the balance struck by Congress in its effort to open up "one-stop shopping" for all telecommunications carriers.

The overarching theme of the 1996 Act is to eliminate artificial barriers to competitive entry and thereby allow local exchange carriers, interexchange carriers, and other telecommunications companies to compete head-to-head in the provision of a broad array of services to the public. Congress recognized the clear public benefits of enabling local exchange carriers to offer long-distance service and also allowing long-distance companies (and cable operators) to offer local exchange service together with long-distance service. The existing structure of the telecommunications industry deprived consumers of these benefits by artificially cabining companies' service offerings to particular types of services and impeding carriers' efforts to offer the public "one-stop shopping" for an array of services.

Congress recognized that the transition to a more competitive environment required careful balancing of interests through a series of interim measures crafted to avoid tilting the competitive field and thereby depriving consumers of these broad-ranging benefits. With respect to the entry of the BOCs into the provision of in-region interLATA service, Congress prescribed in Section 271 that BOCs would first have to set the stage for local exchange competition and meet a "checklist" of requirements. After meeting the requirements of Section 271, the BOCs will be permitted to provide interLATA service. Section 272 requires them to employ structurally separated affiliates for their interLATA telecommunications service for a three-year period, and for interLATA information services for four years. During the transition period, Congress set conditions under which the BOCs and their interLATA affiliates may jointly market and sell each others' local exchange and interLATA service.

The Commission is not free to revisit specific judgments made by Congress in setting the parameters for BOC provision of interLATA services. The Commission was not given broad discretion to decide what structural safeguards are needed—Congress has already made those decisions. Any implementing rules must be fully consistent with the letter and the spirit of the legislative judgment embodied in the 1996 Act.

Any rules adopted by the Commission will be subject to searching judicial review. Plainly, the Commission may not adopt substantive "legislative" rules that conflict with or frustrate achievement of the purposes of the 1996 Act. Any such rules would be promptly set aside by the courts. Moreover, any rules that embody the agency's interpretation of the 1996 Act are "interpretive" rules that do not make substantive law—the statute itself does that.[3] Moreover, interpretive rules would not receive judicial deference because under *Chevron* and its progeny, courts do not defer to agency statutory interpretations where the statute is clear.[4] This statute *is* clear, and "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."[5] Accordingly, on judicial review, FCC rules based on the agency's interpretation of the 1996 Act would be measured

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3 *See Chrysler Corp. v. Brown,* 441 U.S. 281, 301-02 (1979); *see also Yale Broadcasting Co. v. FCC,* 478 F.2d 594, 599 (D.C. Cir.), *cert. denied,* 414 U.S. 914 (1973).

4 *See Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984).

5 *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940), *quoted in Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *see Caminetti v. United States*, 242 U.S. 470, 490 (1917).

against the plain language of the statute, and they could be rendered ineffective if the Court found that the rules are inconsistent with, or frustrate, the clear intention of Congress.

Given the extraordinary level of detail set forth by Congress in Sections 271 and 272 concerning the non-accounting safeguards to which BOCs will be subject, it is questionable whether there is a need for *any* rules, other than ones that simply incorporate the statutory language. Almost any rule the Commission adopts would interfere with the accomplishment of the Congressional objectives. Certainly, any attempt to add to or change what Congress has set forth, through legislative rules, would conflict with the statute. Moreover, interpretive rules cannot in any binding way establish what the statute does or does not require. Accordingly, BellSouth submits that there is no need for adoption of rules to implement the non-accounting safeguards set forth in Sections 271 and 272.

The courts have time and again made clear that agencies are not free, through exercise of their general rulemaking authority, to supplement a statutory scheme that is essentially complete in itself:

> [An agency] cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of [the agency] in a particular area.[6]

When Congress has not left gaps to be filled by agency rules "'either explicitly by authorizing the agency to adopt implementing regulations, or implicitly by enacting an ambiguously worded provision that the agency must interpret,'" the agency lacks "discretionary authority . . . to consider other factors."[7] Thus, when Congress has "crafted a very definite scheme" setting forth the criteria an agency is to consider, it deprives the agency of authority "to consider other factors 'in the public

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6 *American Petroleum Institute v. EPA,* 52 F.2d 1113, 1119 (D.C. Cir. 1995).

7 *Ethyl Corp. v. EPA,* 51 F.3d 1053, 1060 (D.C. Cir. 1995) (*quoting National Fuel Gas Supply Corp. v. FERC,* 811 F.2d 1563 (D.C. Cir.), *cert. denied,* 484 U.S. 869 (1987)).

interest.'"[8] In other words, "the general grant of rulemaking power to [an agency] cannot trump specific portions of [the statute] and . . . [the agency] cannot use the general rulemaking authority . . . as justification for adding new factors to a list of statutorily specified ones."[9]

Sections 271 and 272 are very detailed provisions that strike a delicate balance, not favoring either the BOCs or the interexchange carriers. Rather, Congress establish parity among them as they begin to enter each others' fields. Congress sought to give the BOCs the ability to enter interLATA service, both in- and out-of-region, just as it sought to give interexchange carriers an opportunity to provide local service. What this statute is all about is the rapid, evenhanded transition to a telecommunications environment free of barriers to entry and competition at all levels.

To achieve the objectives of Congress, the Commission cannot favor either the BOCs or the interexchange carriers in implementing the provisions of the statute. In BellSouth's view, the Commission's *Interconnection Order*[10] has already impermissibly tipped the competitive balance toward the interexchange carriers by granting new local exchange entrants uncalled-for concessions and saddling LECs with new obligations not required by Congress. BellSouth urges the Commission not to tilt the playing field any further in this proceeding.

In particular, AT&T, the nation's largest telecommunications company, has a century-old nationwide presence. It has a reputation and service marks that are nationally recognized. These give it tremendous competitive advantages in marketing integrated telephone service throughout the nation that includes both interLATA and local exchange service. BellSouth and the other BOCs,

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8 *Id.* at 1061; *see also American Petroleum Institute,* 53 F.3d at 1120 (courts "will not presume a delegation of power based solely on the fact that there is not an express withholding of such power").

9 *American Petroleum Institute,* 52 F.3d at 1119.

10 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, *First Report and Order,* FCC 96-325 (Aug. 8, 1996) (*"Interconnection Order"*).

by contrast, are well-known only in their regions. They face almost insuperable obstacles in establishing a national presence that can compete with AT&T.

For the Commission to favor national interLATA carriers in the rules that will govern the competition between AT&T and the BOCs in providing consumers with one-stop shopping opportunities would be manifestly contrary to the intention of Congress to establish parity between the BOCs and the major interLATA carriers and devastate the carefully balanced statutory scheme that Congress worked years to establish. It would deprive the public of the benefits of a telecommunications system characterized by real competition at every level instead of regulatory barriers dividing the nation's telecommunication network up into a patchwork of minimally competitive fiefdoms.

DISCUSSION

I. JOINT MARKETING RESTRICTIONS (*NPRM* ¶¶ 90-93)

A. The Commission Should Not Adopt Regulations Concerning Joint Marketing (*NPRM* ¶¶ 90-92)

The joint marketing of local and interLATA service is central to the effectuation of the objectives of the 1996 Act and is critical to BellSouth's business plans. The term "joint marketing" is used in Section 272(g) to refer to the marketing or sale, during the three-year transition period when a separate affiliate is required for interLATA service, of the affiliate's interLATA service by the BOC or the BOC's local exchange service by the affiliate.

Sections 271 and 272 set up a detailed statutory scheme for BOC entry into interLATA service that the Commission is not free to override or change. The BOCs may enter the interLATA business once the local exchange market has been opened to competitive entry and a detailed competitive checklist has been satisfied. For the first three years after BOC interLATA entry is authorized, the BOCs must use a structurally separated affiliate for their provision of interLATA service. Even though Congress required the use of a separate affiliate for the *provision* of interLATA service, Congress expressly decided not to delay the consumer benefits of being able to obtain local and interLATA service from a single point of contact within the company—"one-stop shopping" for telephone service. The Commission itself has recognized these substantial benefits:

> We believe that the benefits to consumers of "one-stop shopping" are substantial, and disagree with joint petitioners' claim that a consumer should only get one opportunity to engage in "one-stop shopping." . . . The ability of a customer, especially a customer who has little or infrequent contact with service providers, to have one point of contact with a provider of multiple services is efficient and avoids the customer confusion that would result from having to contact various departments within an integrated, multi-service telecommunications company . . . .[11]

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[11] *Craig O. McCaw,* 10 F.C.C.R. 11,786, 11,795 (1995).

Accordingly, the statute explicitly permits both the BOC and its interLATA affiliate to engage in joint marketing of local and interLATA service during the initial three-year period, provided specific conditions are met.

The statute contains three provisions that specifically authorize such joint marketing by BOCs, by their interLATA affiliates, and by long-distance companies. The legislative history explains that these three provisions ensure "parity" among these companies in their ability to offer consumers "one-stop shopping."[12] Specifically, Section 273(e)(1) allows the major long-distance companies to jointly market resold local exchange service with their interLATA service once the BOCs have been authorized to enter the interLATA business, while at the same time Sections 272(g)(1) and (g)(2) permit both the BOCs and their interLATA affiliates to jointly market each other's service.[13] Despite the statute's call for parity in the time of entry by the big three interexchange carriers and the BOCs into each others' markets, the Commission has already tilted the balance toward the interexchange carriers by allowing them to combine their interLATA service with local exchange service network elements purchased from the BOCs even before the BOCs have been authorized to enter the interexchange market.[14] For the Commission to tilt the scales even further here, by eliminating the BOCs' statutory right to engage in the direct joint marketing of local and interLATA service, would completely vitiate the balanced approach struck by Congress and would eliminate any parity between the BOCs and the major interLATA carriers in offering "one-stop shopping" to consumers.

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12 S. Rep. No. 23, 104th Cong., 1st Sess. 23, 43 (1995) ("Senate Report").

13 BellSouth concurs with the Commission's tentative conclusion that the terms "jointly market" in § 271(e) and "market or sell" in § 272(g) are intended to mean the same thing. *See NPRM* at ¶ 91 & n.166

14 *Interconnection Order* at ¶ 356.

The Conference Report summarizes the joint marketing provisions concerning the BOCs and their interLATA affiliates as follows:

- "New section 272(g)(2) permits a BOC, once it has been authorized to provide interLATA service pursuant to new section 271(d), to jointly market its telephone exchange services in conjunction with the interLATA service being offered by the separate affiliate . . . ."[15]

- "New section 272(g)(1) permits the separate affiliate . . . to jointly market any of its services in conjunction with the telephone exchange services and other services of the BOC so long as the BOC permits other entities offering the same or similar services to sell and market the BOC's telephone exchange services."[16]

Thus, Congress specifically endorsed joint marketing by the BOC and its interLATA affiliate during the three-year transition period, just as it endorsed joint marketing by interexchange carriers.

These joint marketing provisions are an integral part of the Congressionally-established scheme for eliminating barriers to entry into the local and long-distance markets. A BOC may begin jointly marketing only *after* its markets have been opened to local exchange competition, it has satisfied the detailed competitive "checklist" contained in Section 271, and it has established a separate affiliate for engaging in interLATA service. As the Senate Report stated, joint marketing by the BOC at this point must be allowed in order to maintain "parity" between the BOCs and the interLATA carriers. Any regulations that would interfere with the BOCs' ability to engage in joint marketing, therefore, would completely upset the delicate balance struck by Congress.

Nevertheless, the Commission is considering structural restrictions that would severely hamper the BOCs' ability to engage in joint marketing of local and interLATA services, after the BOCs have satisfied § 271 and have been permitted to provide interLATA service in-region. Paragraph 92 of the *NPRM* suggests that the Commission may forbid BOC personnel from selling

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15 H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 152 (1996) ("Conference Report" or "Joint Explanatory Statement").

16 *Id.*

the interLATA service of the BOC's affiliate and may instead require that the BOC and its interLATA affiliate contract jointly with an outside entity to provide joint marketing of local exchange and interLATA service.[17]

This would directly contravene the express will of Congress as embodied in the plain language of § 272, as well as the Conference Report language quoted above. Joint marketing by the BOC itself is expressly authorized by § 272(g)(2), which permits a BOC "to market or sell interLATA service provided by an affiliate required by this section within any of its in-region States" as long as "such company [the BOC] is authorized to provide interLATA services in such State under Section 271(d)." The Commission may not adopt rules prohibiting what Congress has expressly authorized.

As "interpretive" rules, such rules would not make substantive law and would lack any binding legal effect.[18] The statute authorizes what it authorizes, no more and no less. Moreover, the Commission may not adopt "legislative" rules that contravene the plain language of the statute. Section 4(i) permits the Commission to adopt rules only if they are "not inconsistent with this Act,"[19] and any rules purporting to prohibit what the statute plainly permits would be subject to being vacated by a reviewing court because they are "not in accordance with law."[20]

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17 The Commission is apparently considering this proposal in part because § 272(b)(3) requires a separate affiliate to have separate officers, directors and employees from the BOC. *NPRM* at ¶ 92. However, the BOC employees who are engaged in the "marketing or sale" of the affiliate's interLATA service under § 272(g)(2) will not be employed by the separate affiliate and will be entirely separate from the affiliate's employees. Thus, § 272(b)(3) poses no obstacle to the BOC using its own employees for the joint marketing of its own local exchange service and its affiliate's interLATA service. Whether the BOC resells the affiliate's service on its own account or acts as an agent or dealer for the affiliate, the transactions between the BOC and its affiliate must be reduced to writing, pursuant to § 272(b)(5), as the Commission notes in paragraph 92 of the *NPRM.*

18 *See Chrysler Corp.*, 441 U.S. at 301-02.

19 47 U.S.C. § 154(i).

20 5 U.S.C. § 706(2)(A).

Previous attempts by the Commission to circumvent a detailed statutory scheme through regulations have been soundly rejected by the courts. In 1985, the D.C. Circuit struck down FCC rules that prohibited nondominant common carriers from filing tariffs, despite the specific requirement of Section 203 that they file such tariffs.[21] Then, in 1992, the D.C. Circuit vacated FCC rules that permitted such carriers not to file tariffs.[22] Finally, in 1994, the Supreme Court rejected the FCC's attempt yet again to adopt permissive detariffing rules in the face of the statutory scheme set forth in Section 203.[23] Holding that the tariff-filing requirement was a central element of the Title II regulatory scheme, the Court found that the FCC had engaged in a "fundamental revision of the statute," and that whether or not the FCC's permissive detariffing policy was "a good idea, . . . it was not the idea Congress enacted into law in 1934."[24] Just as the tariff-filing requirement was central to Title II, the Congressional decision to permit joint marketing by the BOCs is central to the scheme enacted by Congress in 1996. Even if permitting joint marketing only through a third party were a "good idea," it is not the idea enacted by Congress in the 1996 Act.

The Commission has also sought comment on whether the joint marketing restrictions in §§ 271(e) and 272(g) would prohibit "advertising the availability of interLATA services combined with local exchange services, making these services available from a single source, or providing bundling discounts for the purchase of both services."[25] BellSouth submits that these are all forms of joint marketing that are permitted by these sections provided that the prerequisite conditions for engaging in joint marketing have been satisfied. InterLATA carriers, BOCs, and BOC separate

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21 *MCI Telecommunications Corp. v. FCC,* 765 F.2d 1186 (D.C. Cir. 1985).

22 *AT&T v. FCC,* 978 F.2d 727 (D.C. Cir. 1992), *cert. denied,* 509 U.S. 913 (1993).

23 *MCI Telecommunications Corp. v. AT&T,* 114 S.Ct. 2223 (1994).

24 *Id.* at 2232.

25 *NPRM* at ¶ 91.

affiliates would be prohibited from engaging in any of these forms of joint marketing until such time as they have satisfied the statutory conditions. Because such joint marketing is fully addressed by the statute, no regulations are needed.

Accordingly, BellSouth respectfully submits that Section 272(g)'s provisions concerning joint marketing are complete in themselves. No regulations are needed to implement them. The Commission is free to adopt rules incorporating the statutory language, but no more. The FCC is not permitted, through unnecessary regulation, to neuter the joint marketing authority that Congress expressly granted to the BOCs.

B. A Ban on Joint Marketing or Advertising of Jointly Marketed Services Would Violate the First Amendment (*NPRM* at ¶¶ 91-92)

The Commission's proposal to ban joint marketing directly by BOCs and their affiliates, requiring instead that they engage a third party for all joint marketing, as well as its proposal to prohibit advertising of jointly marketed services, would constitute a prior restraint on commercial speech contravening the First Amendment. Corporations, including public utilities, receive full First Amendment protection and have a constitutional right to market and advertise their lawful products and services unless there is a substantial governmental reason justifying properly tailored regulation to the contrary. In *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, the Court observed that "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" and struck down a state attempt to regulate what the utility did with the excess space in the company's billing envelopes. [26] Moreover, banning the speech of one group of speakers has the

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[26] *Pacific Gas and Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 8 (1986) (*quoting First National Bank v. Bellotti*, 435 U.S. 765, 783 (1978)) (citations omitted); *accord Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 n.1 (1980).

effect of prohibiting certain viewpoints. In *City of Lakewood v. Plain Dealer Publishing Co.*, the Supreme Court observed:

> [A] law or policy permitting communication in a certain manner *for some but not for others* raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.[27]

Complete bans by government concerning the marketing of lawful products and services are highly suspect and subject to searching review.[28] Thus, in considering a complete ban on promotional advertising by electric utilities in *Central Hudson Gas & Elec. Corp.*, the Court struck down the ban, holding that restrictions on commercial speech cannot be "more extensive than is necessary" to serve a "substantial" governmental interest.[29] Moreover, in *44 Liquormart, Inc. v. Rhode Island,* where a ban on liquor price advertising was at issue, the Court found that "special dangers . . . attend complete bans on truthful, nonmisleading commercial speech" and that such bans "rarely protect consumers from [commercial] harms."[30] The Court recognized that:

> "The commercial market-place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment."[31]

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27 *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) (emphasis added).

28 *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 96-97 (1977) (finding ban on "for sale" signs unconstitutional).

29 *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 566 (1980); *see also Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995).

30 *44 Liquormart, Inc. v. Rhode Island,* 116 S.Ct. 1495, 1507-08 (1996).

31 *Id.* at 1508 (*quoting Edenfield v. Fane,* 507 U.S. 761, 767 (1993)).

In the present setting, Congress has already determined that there is an important governmental interest in *allowing* joint marketing by the BOCs, assuming the stated conditions are met. In short, Congress has determined that the sale and marketing of interLATA service together with exchange service directly by the BOCs and their affiliates is a lawful commercial activity. Nevertheless, under the guise of interpreting the statute, the FCC is considering a ban on direct-to-the-customer joint marketing by the BOCs and their affiliates. The Commission cannot shoulder the burden of sustaining such a prior restraint on lawful commercial speech. The FCC does not attempt to articulate a "substantial" government interest in support of the proposed regulation—in fact, it does not even mention *any* government interest that it would serve. Moreover, the ban would not advance any governmental interest defined by Congress, and it would in fact be contrary to the Congressional decision to authorize joint marketing. Accordingly, the Commission's tentative proposal to ban joint marketing directly by BOCs and their affiliates cannot pass muster under the First Amendment.

II. SCOPE OF THE COMMISSION'S AUTHORITY (*NPRM* ¶¶ 19-30)

As discussed in the Introduction above, the Commission must give full effect to the judgments of Congress embodied in the 1996 Act and may not frustrate the objectives of the statute. BellSouth agrees with the Commission's tentative conclusion that the scope of Sections 271 and 272 extends to both interstate and intrastate interLATA services. Congress plainly intended to supplant the provisions of the MFJ that restrained the BOCs' provision of all interLATA services, both interstate and intrastate. In so doing, however, Congress did not intend to give the Commission plenary jurisdiction over intrastate interLATA services. Accordingly, BellSouth disagrees with the Commission's tentative view that Sections 271 and 272 effectively override the provisions of Section 2(b).[32]

Section 2(b)(1) deprives the FCC of jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."[33] The fact that Sections 271 and 272 extend to intrastate interLATA services, including information services, does not change this basic jurisdictional fact. As the Commission notes, neither Section 271 nor Section 272 is among the parts of the Communications Act specifically exempted from Section 2(b).[34] This strongly suggests that Congress did not intend to create a broad exception from the jurisdictional limits set by Section 2(b). Moreover, both the House and Senate versions of the bill *would* have exempted the BOC interLATA provisions of the bill from Section 2(b),[35] but the change to Section 2(b) was not contained in the bill that emerged

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32 *See NPRM* at ¶ 26.

33 47 U.S.C. § 152(b)(1).

34 *See NPRM* at ¶ 26.

35 *See* H.R. 1555, 104th Cong., 1st Sess. § 101(e)(1) (Oct. 12, 1995); S. 652, 104th Cong., 1st Sess. § 101(c)(2) (June 23, 1995).

from conference and became law. This confirms that Congress specifically considered adopting such an exemption, but in the end chose not to do so.

The explicit grants of FCC jurisdiction in Sections 271 and 272 override the generic restrictions on FCC jurisdiction in Section 2(b),[36] but these exemptions must be narrowly construed in order to preserve the meaning of Section 2(b).[37] Thus, the FCC unquestionably has authority to entertain and act upon Section 271 applications for BOC interLATA entry, whether interstate or intrastate; to enforce the requirements of Section 271; to prescribe the manner in which the books, records, and accounts of the separate affiliate must be maintained; to engage in joint federal/state audits; and to extend the sunset period for the structural separation requirements of Section 272, because the FCC's authority to do so is set forth with specificity in the statute. It is noteworthy, however, that neither Section 271 nor Section 272 contains a general grant of rulemaking authority to implement the provisions of these sections, unlike many other sections of the 1996 Act. This indicates that the FCC's authority is limited to carrying out the specific duties outlined in these sections.[38]

Nothing in Sections 271 or 272, however, expressly grants the Commission authority to adopt regulations inconsistent with Section 2(b), and indeed the Commission is prohibited from

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36 Even in the absence of an exception to Section 2(b), Sections 271 and 272 must override Section 2(b) to some extent in order to achieve their express purpose, under the long-honored canons of statutory construction that the general must yield to the specific and that all portions of a statute must be given effect. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (*citing Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)); *Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1361 n.25 (D.C. Cir. 1988) (*TRAC*); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute, . . . rather than to emasculate an entire section . . . .'") (*quoting Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

37 *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285, 1292 (D.C. Cir.), *aff'd mem.*, 110 S. Ct. 398 (1989) (citing the interpretive canon that exemptions "should be construed narrowly").

38 *See, e.g., American Petroleum Institute v. EPA*, 52 F.3d at 1119-20.

doing so by the express terms of Section 4(i), its generic source of rulemaking authority.[39] Moreover, Section 272(f)(3) expressly preserves the FCC's preexisting jurisdiction to establish safeguards consistent with the public interest, convenience, and necessity—jurisdiction that was, and remains, subject to the limitations imposed by Section 2(b). Accordingly, the Commission does not have jurisdiction to adopt structural safeguards not specified in the statute that would apply to intrastate services.

The Commission asks whether it would have authority under Section 271 and 272 to adopt regulations that would preempt "potentially inconsistent state regulations" concerning joint use of facilities by a BOC and its separate affiliate, sharing of personnel by a BOC and its separate affiliate, and BOC discrimination in favor of its affiliate.[40] The simple answer is that the states have the same authority that they previously had regarding such matters, except to the extent that such state regulations would conflict with Sections 271 and 272. A state clearly could not adopt regulations that would be inconsistent with, for example, the provisions of Section 272(b) regarding the need for structural separation. No FCC preemptive action is needed to render such state regulations invalid; if state regulations conflict with a valid federal statute, they are preempted by the statute as a matter of law.

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39 47 U.S.C. § 154(i) provides that the Commission may adopt rules "not inconsistent with this Act."

40 *See NPRM* at ¶ 28.

III. ACTIVITIES SUBJECT TO SECTION 272 REQUIREMENTS (*NPRM* ¶¶ 31-54)

A. Previously Authorized Activities (*NPRM* ¶¶ 34, 38, 39)

The Commission asks whether Section 272(h)—which gives BOCs one year from the date of enactment to comply with the separate affiliate requirements—applies to activities that were authorized by the MFJ court prior to enactment, in light of Sections 271(f), 272(a), and 272(c). BellSouth submits that the clear effect of these sections taken together is to permit BOCs to engage in all activities previously authorized by the MFJ court under the conditions imposed by the MFJ court, without imposition of a new structurally separated affiliate requirement, and that this will continue to be the case after the first anniversary of the 1996 Act.

Section 271(f) states, in relevant part:

> Neither subsection (a) nor section 273 shall prohibit a Bell operating company or affiliate from engaging, *at any time after the date of enactment* of the Telecommunications Act of 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by [the MFJ court] . . . if such order was entered on or before such date of enactment, to the extent such order is not reversed or vacated on appeal.[41]

Sections 271(a) and 273, respectively set forth the terms and conditions under which the BOCs may engage in interLATA services and manufacturing. The Conference Report indicates that Section 271(f) was intended to "grandfather[] activities under existing waivers[,] . . . covering both interLATA services and manufacturing."[42]

Thus, with respect to interLATA telecommunications services, the plain import of Section 271(f) is that Section 271(a), which prohibits BOCs from providing interLATA services prior to making a Section 271 showing and requiring a separate affiliate for interLATA services for a three-

41 47 U.S.C. § 271(f) (emphasis added).

42 Conference Report at 149.